



NORTHWEST ENVIRONMENTAL DEFENSE CENTER
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April 8, 2013

FREEDOM OF INFORMATION ACT REQUEST

VIA EMAIL

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
FOIA@noaa.gov

**RE: Freedom of Information Act Request for Information Concerning ESA
Section 7 Consultation for Relicensing and NPDES Permitting of the
Columbia Generating Station Nuclear Power Plant in Benton County,
Washington**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Northwest Environmental Defense Center ("NEDC") requests copies of public records in the custody of the National Marine Fisheries Service ("NMFS") identified below.

NEDC is a nonprofit environmental organization with its principal place of business in Portland, Oregon. It is an independent organization that was established by a group of professors, law students and attorney alumni at Lewis and Clark Law School in 1969. NEDC is comprised of citizens, attorneys, law students and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy and litigation independently and in conjunction with other environmental groups.

On October 24, 2011, the National Oceanic and Atmospheric Administration, though NMFS, directed the U.S. Nuclear Regulatory Commission ("NRC") to initiate formal consultation under section 7(a)(2) of the Endangered Species Act of 1973, as amended ("ESA"), regarding its decision to renew the operating license for the Columbia Generating Station Nuclear Power Plant ("CGS") in Benton County, Washington. On May 7, 2012, NMFS requested the opportunity to review and comment on the State of Washington's and the Energy Facility Site Evaluation Council's ("EFSEC") Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit for the CGS, for which Energy Northwest requested a renewal on November 19, 2010.

NEDC is seeking information about these requests and any steps taken by NRC, the Environmental Protection Agency (“EPA”), or NMFS since that time.

Requested Records

NEDC respectfully requests copies of any and all records and communications relating to NMFS’s request that NRC initiate formal consultation under section 7(a)(2) of the ESA regarding the operating license renewal of CGS. This includes, but is not limited to, the October 24, 2011 letter from NMFS requesting that NRC initiate formal consultation, any and all documents that NMFS relied upon to make the determination that consultation is necessary, and any and all subsequent records or communications by and/ or between NMFS related to the request for consultation.

We also request any and all records related to NMFS’s request to review Energy Northwest’s renewal of CGS’s NPDES permit. This includes, but is not limited to, the May 7, 2012 letter from NMFS to Dennis McLerran, EPA Region 10, initiating coordination between EPA and NMFS regarding the NPDES permit. This also includes any and all subsequent records or communications by and/ or between NMFS related to its request to review the NPDES permit and to initiate coordination to address NMFS’s concerns related to impacts to species protected under the ESA.

This request applies to all such records in whatever form, including (without limit) correspondence, memoranda, notes, telephone conversation notes, e-mail messages and electronic files, the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that, by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. This request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. To save resources and mailing expense, we request electronic copies of these documents if available.

Exempted and nonexistent documents

Please include in your response an explanation of which documents, if any, may be privileged or exempt from this FOIA request and why. 15 C.F.R. § 4.7(a). If you should seek to prevent disclosure of any of the requested records, we request that you: (1) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (2) explain in full the basis on which nondisclosure is sought, including applicable FOIA exemption(s); and (3) provide us with any segregable portions of the records for which you do not claim a specific exemption. *Id.* § 4.8(b).

Request for Fee Waiver

NEDC requests that you waive all fees in connection with this request. FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit public interest groups, such as NEDC, access to government documents

without the payment of fees. The courts have stated that the statute “is to be liberally construed *in favor of waivers* for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)) (emphasis added). *See also Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). As shown below, NEDC meets FOIA’s two-pronged test for a fee waiver because disclosure of the requested documents is both in the public interest and not primarily in the commercial interest of NEDC. 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 15 C.F.R. § 4.11(k)(1).

I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the government.

NEDC qualifies for a fee waiver because the requested information is likely to significantly contribute to the public understanding of government operations or activities. Under the FOIA the fee associated with the document production is waived if the release of the information is in the “public interest.” 5 U.S.C. § 552(a)(4)(A)(iii) (“documents shall be furnished without any charge . . . if disclosure of the information is in the public interest”). Pursuant to NMFS’s implementing regulations at 15 C.F.R. § 4.11(k)(2), disclosure is in the public interest if: (1) the subject of the request concerns the operations or activities of the government; (2) disclosure is “likely to contribute” to an understanding of government operations or activities; (3) disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject; and (4) the resulting contribution to public understanding of government operations or activities is likely to be significant. Because disclosure of the information NEDC requests herein meets these four factors, disclosure is in the public interest and NEDC should be granted a fee waiver.

A. The subject of NEDC’s request directly and clearly concerns “the operations or activities of the government.”

NEDC’s request concerns the operations and activities of the government. 15 C.F.R. § 4.11(k)(2)(i). The requested documents relate to NMFS’s communications, determinations and decisions regarding the application of the ESA to various federal authorizations and renewals for CGS. Such recommendations are precisely the type of operation or activity contemplated by the FOIA fee waiver provision. *See, e.g., Natural Res. Defense Council v. E.P.A.*, 581 F. Supp. 2d 491 (S.D.N.Y. 2008) (granting a fee waiver for a request for EPA’s records recommending the use of a pesticide for potatoes closer to harvesting time than currently allowed).

The documents NEDC seeks likely contain specific questions, instructions or interpretations by NMFS to and/ or between NRC or EPA regarding the application of the ESA in the context of nuclear power plant relicensing and CWA permitting, respectively. As NMFS is the lead Federal agency charged with consulting with federal agencies regarding their actions that may affect ESA listed marine wildlife and anadromous fish, any information pertaining to NMFS’s involvement with the ESA consultation that

occurred related to CGS's relicensing is presumed to be held by NMFS. Such information regarding NMFS's decisionmaking and interpretations constitutes operations or activities of the government.

B. Disclosure of the requested information is "likely to contribute" to an understanding of government operations or activities.

The information requested by NEDC is likely to contribute to an understanding of government operations and activities. 15 C.F.R. § 4.11(k)(2)(ii). To the best of NEDC's knowledge, the requested information is not already in the public domain. The information contained in the requested documents will provide an otherwise unavailable window regarding NMFS's determination of whether NRC must undergo consultation for reviewing CGS's operating license and whether EPA or the State of Washington needs to or has coordinated with NMFS regarding the renewal of CGS's NPDES permit.

Moreover, this information will allow the public the opportunity to review NMFS's determinations as to whether NRC must complete consultation. The information will also provide a basis for public understanding of how the CWA permitting process overlaps with ESA consultation requirements in this context. Such information is critical for the public to be assured that the ESA is being implemented as Congress intended. Thus the requested communications and determinations regarding the need for NRC or EPA to complete consultation or coordination with NMFS are meaningfully informative about NMFS's operations and activities. The requested information will help explain the application of the ESA to protect against the potential impact of CGS on the environment in Eastern Washington.

C. Disclosure of the information requested by NEDC will contribute to public understanding of the subject.

The requested information will contribute to public understanding of the subject. Information that could "support oversight of [an agency's] operations" is the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. In furtherance of its mission to protect the environment and natural resources of the Pacific Northwest through education, advocacy, and litigation, NEDC has an interest in ensuring protection of the habitat and threatened or endangered species in Eastern Washington. This includes ensuring protection of water quality in the Columbia River and the listed species that depend on the river. NEDC intends to analyze the documents provided to ensure that CGS is compliant with the ESA.

After reviewing the information provided, NEDC intends to use its resources and expertise to inform and educate volunteers, members and supporters about the interactions regarding authorizations and renewals for CGS. NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on environmental compliance and other issues regarding environmental quality in the Pacific Northwest. NEDC is uniquely qualified to disseminate the information to a large cross-

section of the population. NEDC, long known for its leadership role in ensuring agency compliance with federal law, uses a combination of education, research, and advocacy to inform the public on how government actions impact Washington's precious natural resources. NEDC will draw on its expertise and existing connections to the community in Eastern Washington and throughout the Pacific Northwest to disseminate this information.

The information will be disseminated to the public through our website (www.nedc.org), electronic news bulletins, newsletter, and other publications, all of which are available free of charge to interested parties. *See Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d. Cir. 1994) (observing that the relevant inquiry is "whether [the] requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"). *See also Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding requester's publication of online newsletter and intent to create website using requested records, among other things, sufficient for dissemination purposes). By analyzing the requested information and then disseminating the results among NEDC's members and the community in the Pacific Northwest, "disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 15 U.S.C. § 4.11(k)(2)(iii). Hence NMFS's disclosure of the information requested by NEDC will contribute to public understanding of the subject.

D. The disclosure will contribute "significantly" to public understanding of government operations or activities.

Disclosure of records pertaining to communications by and between NMFS and NRC or EPA is likely to "significantly" contribute to public understanding of NMFS's operations and activities in Washington. 15 C.F.R. § 4.11(k)(2)(iv). The disclosure of NMFS's communications and determinations as to whether NRC should have consulted under the ESA and the extent of coordination with EPA for decisions and authorizations at CGS will contribute to public knowledge that did not exist pre-disclosure.

NEDC's subsequent analysis and dissemination of this information to the public will increase public understanding to a significant extent. *See Ctr. For Biological Diversity v. OMB*, 546 F. Supp. 2d 722, 731 (N.D.Cal. 2008) (granting a fee waiver because "[m]ere knowledge of the weight [the OMB placed upon greenhouse gas emissions when it conducted its analysis] will significantly increase the public's understanding"). NEDC has a consistent record of significantly increasing public understanding of the effects of federal agency action on protecting the environment. The requested information will also significantly inform the public about ongoing discussions between NMFS, NRC and EPA regarding the application of federal law to CGS.

II. NEDC has no commercial interest in the requested information.

The second element of the fee waiver analysis addresses the requester's

“commercial interest” in the information. To determine if the request is made primarily for the commercial benefit of the requester, NMFS’s regulations examine two relevant factors. 15 C.F.R. § 4.11(k)(3).

The first factor considered is “whether the requester has a commercial interest that would be furthered by the requested disclosure.” 15 C.F.R. § 4.11(k)(3)(i). As a 501(c)(3) nonprofit, NEDC has no commercial, trade or profit interest in the material requested. NEDC will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. Therefore, NEDC does not seek this information for any use that furthers a commercial interest.

The second factor hinges on “the primary interest in the disclosure.” 15 C.F.R. § 4.11(k)(3)(ii). The identified commercial interest cannot be significantly more substantial than the public interest. *Id.* There is great public interest in the release of the materials sought because they will provide previously unavailable information regarding NMFS’s interpretations of whether and to what extent the NRC must undergo ESA section 7(a)(2) consultation for renewed authorization of CGS and the extent of coordination between NMFS and EPA regarding an NPDES permit for the same facility.

Thus, assuming *arguendo*, that NEDC has some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because NEDC’s primary interest in the material is to inform the public about the operations and activities of NMFS that affect the environmental quality in Eastern Washington. Therefore, the disclosure of the information is not “primarily in the commercial interest of” NEDC, and a fee waiver is appropriate.

Conclusion

As provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the Department of Commerce’s own regulations, 15 C.F.R. § 4.6(b), I trust that I shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and look forward to hearing from you shortly. If you have any questions, feel free to contact NEDC at (503) 768-6673.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla Nelson", written in a cursive style.

Marla Nelson
Legal Fellow